

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1423

Cir. Ct. No. 2016CV897

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DEMETRIUS FOSTER AND ALVIN FOSTER,

PLAINTIFFS-APPELLANTS,

V.

PARKER COMMUNITY CREDIT UNION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County:
BARBARA W. MCCRORY, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Demetrius Foster and Alvina Foster appeal a summary judgment order that dismissed their claims against Parker Community Credit Union for alleged violations of the Consumer Protection Act. Specifically, the Fosters contend that the credit union acted unconscionably, breached a duty of good faith, and failed to allow them their statutory right to cure a default by purchasing retroactive insurance for a boat that the Fosters had used as collateral for a loan. We reject the Fosters' arguments and affirm the circuit court for the reasons discussed below.

BACKGROUND

¶2 Summary judgment was based upon the following undisputed facts, as set forth in the circuit court's decision.

¶3 On June 15, 2015, the Fosters granted the credit union a lien on a boat that the Fosters owned as security for a loan. The loan agreement required the Fosters to keep the boat insured in an amount acceptable to the credit union, and to provide proof of coverage upon request. If the Fosters failed to fulfill their obligation to keep the boat insured, the credit union could purchase coverage itself and add the cost to the unpaid balance of the Fosters' loan.

¶4 The Fosters allowed the insurance coverage they had obtained on the boat to expire on April 10, 2016.

¶5 On May 19, 2016, the credit union sent the Fosters a letter noting that the credit union had not received proof that the boat was insured after April 10, 2016; reminding the Fosters that they were required to maintain continuous coverage without lapses; and advising the Fosters that if they did not send proof of continuous coverage, the credit union could protect its security

interest by purchasing a collateral protection insurance certificate at the Fosters' expense.

¶6 The Fosters purchased a new insurance policy for the boat that took effect on June 4, 2016, and advised the credit union that they had done so. The Fosters did not, however, obtain retroactive coverage for the fifty-five day period between April 10 and June 4, which we will refer to as the lapsed-coverage period.

¶7 On June 30, 2016, the credit union advised the Fosters that if it did not receive proof of coverage for the lapsed-coverage period, it would purchase a retroactive lender-placed insurance policy at a cost of \$154, which would be added to the balance of the Fosters' loan. After the Fosters failed to obtain or provide proof of coverage for the lapsed-coverage period, the credit union purchased a lender-placed policy and advised the Fosters that the cost would be added to their loan total, but that the policy could be cancelled and a partial refund provided if the Fosters provided acceptable proof of insurance for the lapsed-coverage period.

¶8 Rather than obtaining or providing proof of coverage for the lapsed-coverage period, the Fosters filed this lawsuit, alleging that the credit union had violated WIS. STAT. §§ 425.107 (unconscionable conduct), 421.108 (good faith), and 427.104 (2015-16)¹ (enforcement of non-existent right) of the Wisconsin Consumer Act by purchasing retroactive lender-placed insurance for the lapsed-coverage period and adding the cost of coverage to the Fosters' loan balance. The circuit court dismissed the Fosters' claims on summary judgment and this appeal followed.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

STANDARD OF REVIEW

¶9 This court reviews summary judgment decisions de novo, applying the same legal standard and methodology employed by the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. Our methodology begins with an examination of the pleadings to determine whether the complaint states a claim and the answer joins issue. *State v. Dunn*, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). Assuming the pleadings are sufficient, we then examine the moving party's supporting materials (such as depositions, answers to interrogatories, admissions, and affidavits) to determine whether they establish a prima facie case for summary judgment, and if so, whether the materials submitted by the opposing party are sufficient to place in dispute any material facts that would require a trial. *Id.*; see also WIS. STAT. § 802.08(2).

DISCUSSION

¶10 All three of the Fosters' consumer protection claims rest on the premise that it was unnecessary and unreasonable for the credit union to purchase retroactive insurance for the lapsed-coverage period because the boat was not damaged during that time. However, we agree with the circuit court that the Fosters' allegations were insufficient to establish any of the claimed violations of the Wisconsin Consumer Act.

¶11 First, under the Wisconsin Consumer Act, a court may refuse to enforce any portion of a consumer credit transaction that the court determines to be unconscionable as a matter of law, taking into account such factors as:

- (a) [whether] the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers;
- (b) [whether] those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved;
- (c) [whether] there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value;
- (d) [whether] the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;
- (e) [whether] the terms of the transaction require customers to waive legal rights;
- (f) [whether] the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction;
- (g) [whether] the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder;
- (h) [whether] the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and
- (i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.

WIS. STAT. § 425.107(3). Requiring a consumer to maintain insurance on collateral is common, as is the practice of allowing the lender to purchase gap-coverage insurance if the borrower fails to maintain continuous coverage. Indeed, WIS. STAT. § 422.207(1) explicitly authorizes a lender to pay on the borrower's behalf for the performance of a duty the borrower has failed to fulfill. In short, we

see nothing in the contractual terms at issue here that is unfair or confusing. The Fosters have not persuaded us that any of the statutory factors support a determination of unconscionability here.

¶12 Next, the Wisconsin Consumer Act imposes a duty of good faith in all consumer transactions, meaning “honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.” WIS. STAT. § 421.108. The Fosters contend that the credit union was not acting in good faith when it purchased retroactive insurance for a period of time in which no damage to the boat had actually occurred. However, we do not see why the credit union would have been required to accept at face value the Fosters’ assertion that there had been no damage to the boat. Moreover, the fact that the Fosters were unaware of any damage to the boat caused during the period of lapsed coverage does not preclude the possibility—however remote—that damage might subsequently be discovered and attributed to some event that had occurred during that time period. The Fosters have cited no legal authority or factual basis in their summary judgment materials to support their proposition that it is commercially unreasonable to purchase retroactive insurance policies in situations like the one here, and we conclude that the circuit court properly dismissed the Fosters’ bad faith claim.

¶13 Finally, it is a prohibited practice under the Wisconsin Consumer Act for a debt collector to “[c]laim, or attempt or threaten to enforce a right with knowledge or reason to know that the right does not exist.” WIS. STAT. § 427.104(1)(j). The Fosters contend that the credit union had no right to purchase insurance for the lapsed-coverage period because it had given defective notice of default that did not specify the date by which the defect needed to be cured as required under WIS. STAT. § 425.104(2), and the Fosters had, in any event, cured the

default. We disagree. The loan agreement plainly required the Fosters to maintain continuous insurance coverage on the boat. The Fosters' purchase of prospective insurance for the boat did not cure the period of lapsed coverage. WIS. STAT. § 425.104(2) did not apply because the credit union was not seeking to accelerate repayment of the loan or to take possession of the collateral. WIS. STAT. § 425.105(1). Therefore, the credit union's decision to enforce its contractual remedy of purchasing its own insurance for the lapsed-coverage period was not an attempt to enforce a non-existent right.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

